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4 UNITED STATES DISTRICT COURT
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7 DISTRICT OF NEVADA
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10 UNITED STATES OF AMERICA,
11 Plaintiff,
12 v.
13 CLIFTON JAMES JACKSON,
14 Defendant.
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16 Case No. 3:18-cr-00105-HDM-WGC
17 Case No. 3:22-cv-00140-HDM
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19 ORDER
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22 Before the court is the defendant Clifton James Jackson's
23 motion to vacate, set aside, or correct sentence pursuant to 28
24 U.S.C. § 2255 (ECF No. 125) and supplement (ECF No. 128). The
25 government has responded (ECF No. 129), and the defendant has
26 replied (ECF Nos. 130 & 131).

27 **I. Factual and Procedural Background**

28 In a 2012 jury trial before Judge Jones, Jackson was convicted
1 of one count of possession of a firearm by a convicted felon. (See
2 Case No. 3:11-cr-00142-HDM). As Jackson qualified as a career
3 criminal under the Armed Career Criminal Act, 18 U.S.C. § 922(g),
4 he was sentenced to 180 months in prison. The judgment was affirmed
5 on appeal.

6 Three years later, the Supreme Court decided in *Johnson v.*
7 *United States*, 576 U.S. 591 (2015) that the residual clause of the
8 definition of violent felony contained in the ACCA was
9 unconstitutional vagueness. In light of *Johnson*, the government and
10 Jackson filed a joint motion for habeas relief that Jackson should
11 be resentenced without application of the career offender

1 designation, which the court granted. Upon resentencing, Jackson
2 received a prison term of 60 months, which resulted in his
3 immediate release from custody.

4 Two years later, Jackson was arrested for various firearms
5 related offenses and, in addition to being subject to revocation
6 in Case No. 3:11-cr-00142, was charged with felon in possession of
7 a firearm and felon in possession of ammunition in the instant
8 case. This case, as his 2011 case, was originally assigned to Judge
9 Jones.

10 The two-count indictment was returned on December 13, 2018.
11 Trial was scheduled to begin on February 11, 2019. At the February
12 5, 2019, calendar call, however, defense counsel indicated that a
13 large amount of discovery had just been disclosed by the
14 government. Counsel stated that although Jackson was not waiving
15 his speedy trial rights, counsel would not be able to effectively
16 represent Jackson because they would not have enough time to review
17 the discovery before trial or to prepare a motion to suppress they
18 believed might be necessary. The court determined that a
19 continuation of the trial was in the interests of justice, and
20 trial was therefore reset to April 8, 2019.

21 On February 26, 2019, Judge Jones recused from this case, and
22 the case was reassigned to this court. Trial ultimately commenced
23 on April 10, 2019, resulting in a verdict of guilty on Count One
24 and not guilty on Count Two.

25 Jackson appealed, arguing among other things that his speedy
26 trial rights had been violated. The Ninth Circuit affirmed, and
27 this § 2255 motion followed.

28

1 **II. Standard**

2 Pursuant to 28 U.S.C. § 2255, a federal inmate may move to
3 vacate, set aside, or correct his sentence if: (1) the sentence
4 was imposed in violation of the Constitution or laws of the United
5 States; (2) the court was without jurisdiction to impose the
6 sentence; (3) the sentence was in excess of the maximum authorized
7 by law; or (4) the sentence is otherwise subject to collateral
8 attack. *Id.* § 2255(a).

9 **III. Analysis**

10 A. Ground One

11 In Ground One, Jackson asserts that his right to equal
12 protection was violated by Judge Jones' decision to exclude from
13 the speedy trial calculation the delay caused by the government's
14 late disclosure of evidence. Jackson asserts that for defendants
15 of other races, other courts have found such delays caused by
16 government actors are not excludable. (ECF No. 125 at 4). Jackson
17 asserts the court's ruling was "selective prosecution."

18 The government argues that Ground One is procedurally
19 defaulted because it was not raised on direct appeal and that, at
20 any rate, selective prosecution is not a theory that applies to
21 judicial rulings.

22 "If a criminal defendant could have raised a claim of error
23 on direct appeal but nonetheless failed to do so, he must
24 demonstrate" either "cause excusing his procedural default, and
25 actual prejudice resulting from the claim of error," *United States*
26 *v. Johnson*, 988 F.2d 941, 945 (9th Cir. 1993), or that he is
27 actually innocent of the offense, *Bousley v. United States*, 523
28 U.S. 614, 622 (1998). "[C]ause for a procedural default on appeal

ordinarily requires a showing of some external impediment preventing counsel from constructing or raising the claim." *Murray v. Carrier*, 477 U.S. 478, 492 (1986). Actual prejudice "requires the defendant to establish 'not merely that the errors at ... trial created a possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions.'" *Bradford v. Davis*, 923 F.3d 599, 613 (9th Cir. 2019) (internal citation omitted).

Jackson could have raised his equal protection and selective prosecution claims on direct appeal but did not do so. The claims are therefore procedurally defaulted. It is unnecessary to resolve whether Jackson can demonstrate cause for the default, because even if he could, he cannot demonstrate prejudice.¹

Jackson has not offered any evidence that similarly situated defendants were treated differently than he was. None of the cases he cites was decided by Judge Jones, and two were not even decided in this district. Furthermore, Jackson has not made a persuasive argument that the circumstances in any of these cases were so like the circumstances of his case so as to be similarly situated.

Moreover, the court is unaware of any authority, and Jackson provides no such authority, supporting the proposition that selective prosecution is a constitutional violation that can be committed by a court by virtue of its judicial rulings. Accordingly, Jackson cannot show prejudice to excuse the procedural default, and Ground One must therefore be dismissed.

¹ Jackson does not argue actual innocence.

1 B. Ground Two

2 In Ground Two, Jackson asserts that his counsel rendered
3 ineffective assistance by: (1) requesting a continuance over his
4 objection; and (2) failing to move to dismiss the indictment for
5 violation of the Speedy Trial Act. (ECF No. 125 at 5).

6 Ineffective assistance of counsel claims are governed by
7 *Strickland v. Washington*, 466 U.S. 668 (1984). Under *Strickland*,
8 a petitioner must satisfy two prongs to obtain habeas relief—
9 deficient performance by counsel and prejudice. 466 U.S. at 687.
10 With respect to the performance prong, a petitioner must carry the
11 burden of demonstrating that his counsel's performance was so
12 deficient that it fell below an "objective standard of
13 reasonableness." *Id.* at 688. "'Judicial scrutiny of counsel's
14 performance must be highly deferential,' and 'a court must indulge
15 a strong presumption that counsel's conduct falls within the wide
16 range of reasonable professional assistance.'" *Knowles v.*
17 *Mirzayance*, 556 U.S. 111, 124 (2009) (citation omitted). In
18 assessing prejudice, the court "must ask if the defendant has met
19 the burden of showing that the decision reached would reasonably
20 likely have been different absent [counsel's] errors." *Strickland*,
21 466 U.S. at 696.

22 Jackson can demonstrate neither deficient performance nor
23 prejudice.

24 Counsel did not directly request a continuance but did advise
25 the court that they would not be able to effectively represent
26 Jackson at a trial the following week. In doing so, counsel also
27 noted Jackson's objection, thus preserving his speedy trial
28 argument for appeal. The record reflects that the last-minute

1 disclosure of evidence was through no fault of the government,
2 which had been working diligently to obtain records from outside
3 state law enforcement agencies. The Ninth Circuit concluded as
4 much in rejecting Jackson's speedy trial claim on appeal. In
5 addition, counsel saw a need for extra time to investigate and
6 file a motion to suppress, which they in fact ultimately did file.
7 Under these circumstances, counsel's decision to suggest the need
8 for a continuance, while preserving Jackson's objection, was not
9 outside the wide range of reasonable representation. Nor, for the
10 same reason, did counsel's choice cause Jackson prejudice.

11 For much the same reason, counsel's failure to file a motion
12 to dismiss for speedy trial violation was neither deficient nor
13 prejudicial. It is not reasonably likely a dismissal under these
14 circumstances would have been granted.

15 Accordingly, Jackson has not established his claim under
16 Ground Two.

17 C. Ground Three

18 In Ground Three, Jackson asserts that the court committed a
19 due process violation when Judge Jones recused himself but left in
20 place his prior critical adverse ruling. (ECF No. 128 at 2 (Supp
21 to Mot)). Like Ground One, this claim is procedurally defaulted,
22 and Jackson has not demonstrated prejudice sufficient to excuse
23 the default.

24 Under *Davis v. Xerox*, 811 F.2d 1293, 1296 (9th Cir. 1987),
25 prior rulings of a judge who has recused from a case due to a
26 conflict of interest must be vacated if the judge was aware of a
27 disqualifying interest at the time of his or her rulings. Here,
28 there is no indication of the basis for Judge Jones' recusal, much

1 less evidence that he was aware of this basis at the time of his
2 ruling. There is furthermore no evidence of bias. Jackson asserts
3 that Judge Jones was biased against him because "Jackson had been
4 successful in appealing [his] unconstitutional one hundred and
5 eight (180) month sentence" in Case No. 3:11-cr-142. But, as noted
6 above, the change to Jackson's sentence was due to a change in the
7 law, and pursuant to a joint motion for habeas relief filed by the
8 government and the defense. There was no appeal or reversal of
9 Judge Jones' rulings. Even if there had been, "[o]pinions formed
10 by the judge on the basis of facts introduced or events occurring
11 in the course of the current proceedings, or of prior proceedings,
12 do not constitute a basis for a bias or partiality motion unless
13 they display a deep-seated favoritism or antagonism that would
14 make fair judgment impossible." *United States v. Hernandez*, 109
15 F.3d 1450, 1454 (9th Cir. 1997) (quoting *Liteky v. United States*,
16 510 U.S. 540 (1994)); see also *Withrow v. Larkin*, 421 U.S. 35, 57
17 ("[I]t is not contrary to due process to allow judges and
18 administrators who have had their initial decisions reversed on
19 appeal to confront and decide the same questions a second time
20 around."); *Wilkinson v. Sullivan*, 2010 WL 4241568, at *25 (C.D.
21 Cal. Sept. 7, 2010), report and recommendation adopted, 2010 WL
22 4237330 (C.D. Cal. Oct. 20, 2010) ("Absent proof of the trial
23 judge's actual bias—which requires something more than the simple
24 fact that the judge's sentencing decision was reversed on appeal—the
25 Court must presume the trial judge's honesty and integrity).
26 Nothing in the record supports Jackson's claim of bias.
27 Accordingly, Jackson has not established prejudice to excuse the
28 default of Ground Three, and Ground Three must be dismissed.

1 D. Ground Four

2 In Ground Four, Jackson asserts that trial and appellate
3 counsel were ineffective because they failed to investigate the
4 available remedies after a judge disqualifies himself and should
5 have moved to vacate Judge Jones' pretrial rulings and/or Jackson's
6 judgment of conviction. (ECF No. 128 at 3). For the reasons
7 discussed with respect to Ground Three, namely that Jackson has
8 failed to establish any bias on the part of Judge Jones or that
9 Judge Jones' rulings should or would have been vacated upon motion,
10 Jackson has established neither deficient performance nor
11 prejudice. Ground Four is without merit.

12 **IV. Motion for Evidentiary Hearing**

13 The court is not required to conduct a hearing on a § 2255
14 motion if "the motion and the files and records of the case
15 conclusively show that the prisoner is entitled to no relief." 28
16 U.S.C. § 2255(b). Because the motion and files and records of this
17 case conclusively show that Jackson is not entitled to relief, his
18 request for an evidentiary hearing is denied.

19 **V. Certificate of Appealability**

20 In order to proceed with an appeal, Jackson must receive a
21 certificate of appealability. 28 U.S.C. § 2253(c)(1); Fed. R. App.
22 P. 22; 9th Cir. R. 22-1; *Allen v. Ornoski*, 435 F.3d 946, 950-951
23 (9th Cir. 2006); see also *United States v. Mikels*, 236 F.3d 550,
24 551-52 (9th Cir. 2001). Generally, a defendant must make "a
25 substantial showing of the denial of a constitutional right" to
26 warrant a certificate of appealability. *Allen*, 435 F.3d at 951; 28
27 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 483-84
28 (2000). "The petitioner must demonstrate that reasonable jurists

would find the district court's assessment of the constitutional claims debatable or wrong." *Allen*, 435 F.3d at 951 (quoting *Slack*, 529 U.S. at 484). In order to meet this threshold inquiry, Jackson has the burden of demonstrating that the issues are debatable among jurists of reason; that a court could resolve the issues differently; or that the questions are adequate to deserve encouragement to proceed further. *Id.*

The court has considered the issues raised by Jackson with respect to whether they satisfy the standard for issuance of a certificate of appealability and determines that none meet that standard. Accordingly, Jackson will be denied a certificate of appealability.

VI. Conclusion

In accordance with the foregoing, IT IS ORDERED that Jackson's motion for relief pursuant to 28 U.S.C. § 2255 (ECF No. 125) is DENIED.

IT IS FURTHER ORDERED that Jackson's request for an evidentiary hearing IS DENIED.

IT IS FURTHER ORDERED that Jackson is DENIED a certificate of appealability.

The Clerk of Court shall enter final judgment accordingly.

IT IS SO ORDERED.

DATED: This 28th day of February, 2023.



UNITED STATES DISTRICT JUDGE